

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 02-278
)	
Petitions for Declaratory Ruling and)	CG Docket No. 05-338
Retroactive Waiver of 47 C.F.R.)	
§ 64.1200(a)(4)(iv) Regarding the Commission’s)	DA 16-317
Opt-Out Notice Requirement for Faxes Sent with)	
The Recipient’s Prior Express Permission)	

**BAIS YAAKOV OF SPRING VALLEY’S COMMENTS ON
EDUCATIONAL TESTING SERVICE’S PETITION SEEKING
RETROACTIVE WAIVER OF THE COMMISSION’S RULE
REQUIRING OPT-OUT NOTICES ON FAX ADVERTISEMENTS SENT
WITH PERMISSION**

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INTRODUCTION

Bais Yaakov of Spring Valley (“Bais Yaakov”) is a plaintiff in a pending TCPA class-action litigation in which it has asserted claims for violations of the 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Regulation”) against ETS. That litigation is styled as *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc. et al.*, 7:13 CV 4577 (S.D.N.Y.). A copy of the Second Amended Complaint in that case in which ETS is named as a defendant is attached to the hereto as Exhibit A. Contrary to ETS’s assertion, ETS was added as a defendant in this case on July 15, 2015, *see* Order attached hereto as Exhibit B, and was served with the Second Amended Complaint on August 18, 2015. *See* Affidavit of Service Attached hereto as Exhibit C.

Bais Yaakov submits these comments in response to the Petition (“Petition”) of Educational Testing Service (“ETS”), filed on March 16, 2016, for a retroactive waiver of 47 C.F.R § 64.1200(a)(4)(iv). The Consumer and Governmental Affairs Bureau (“the Bureau”) sought Comments on the Petition on March 25, 2016. For the reasons stated below, the Petition should be denied.

SUMMARY OF PRIOR PROCEEDINGS

A. Commission Proceedings

Over the course of several years, a variety of parties filed 25 petitions challenging the FCC’s authority to issue the Opt-Out Regulation and, in the alternative, seeking retroactive waivers of the Opt-Out Regulation’s application to them. The openly admitted objective of those parties was to thwart various plaintiffs in then pending litigations from prevailing on claims against them for violation of the Opt-Out Regulation, which constitutes a violation of the TCPA itself. 47 U.S.C. § 227(b)(3).

On October 30, 2014, the Commission issued its Waiver Ruling, reconfirming its authority to issue the Opt-Out Regulation, but granting the waiver requests then before it – and thereby purported to retroactively and prospectively waive almost nine years of violations of the Opt-Out Regulation, from its August 6, 2006 effective date through April 30, 2015, for those who had sought waivers. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 F.C.C.R. 13998, 14011 ¶¶ 1-3 (Rel. Oct. 30, 2014) (“*Waiver Ruling*”) ¶¶ 1-3. In support of its grant of waivers, the Commission found that a notice of proposed rulemaking it had issued back in 2005 (the “NPRM”) and a footnote (footnote 154) in its 2006 implementing order issuing the final Opt-Out Regulation (the “Implementing Order”) “led to confusion or misplaced confidence on the part of petitioners,” and that this “confusion or misplaced confidence” justified a waiver of the Regulation. *Id.*, ¶ 26.

The Commission’s Waiver Ruling also invited others to file additional waiver requests until April 30, 2015: “Other, similarly situated parties may also seek waivers such as those granted in this Order. . . . We expect parties making similar waiver requests to file within six months of the release of this Order.” *Waiver Ruling*, ¶¶ 30. The Commission explicitly stated, however, that “all future waiver requests will be adjudicated on a case-by-case basis,” and that it was “not prejudg[ing] the outcome of future waiver requests in this Order.” *Id.*, ¶ 30, n.102.

B. ETS’s Petition for Waiver

On March 16, 2016, more than 1 year and 5 months after the FCC issued the Waiver Ruling, more than 8 months after ETS was added as a Defendant in this case, about 7 months after ETS was served with the Second Amended Complaint, and more than 10½ months past the April 30, 2015 deadline for waiver applications set by the FCC, *Waiver Ruling*, ¶ 30, ETS filed a petition for waiver of the Opt-Out Regulation. In that Petition, ETS argued that there was “good

cause” to grant ETS a waiver based on the same considerations contained in the *Waiver Ruling* described above. Petition at 6-7 (citing *Waiver Ruling*, ¶¶ 24-25). Nowhere in the Petition did ETS claim that it had ever read footnote 154 of the *Implementing Order*, nor did it ever claim that it had been actually confused by footnote 154 or anything else as to its obligation to place opt-out notices on permission-based fax advertisements. In addition, nowhere in the Petition did ETS claim that it had ever read the NPRM, nor did it ever claim that it had been actually confused by the NPRM.

ETS contended that the public interest would be promoted by granting ETS a retroactive waiver of the Opt-Out Regulation because otherwise it would be “expos[ed] to potentially millions of dollars in damages.” Petition at 7. Moreover, without any elaborating or submitting any proof, ETS conclusorily asserted that it was entitled to a retroactive waiver of the Opt-Out regulation because “[i]ts involvement in sending the fax advertisement at issue was attenuated and tenuous at best,” and a waiver had already been granted to a dismissed co-Defendant in the case who ETS, conclusorily and without submitting any proof, claimed was “the party that composed the fax and caused it to be sent.” *Id.* at 8.

In addition, ETS claimed that it was entitled to an retroactive waiver of the Opt-Out Regulation because it was similarly situated to other parties who had been granted such waivers by the FCC, because the fax at issue “did not omit an opt-out notice altogether” but allegedly “substantially complied with the TCPA’s requirements, and because the FCC granted a retroactive waiver to two previously dismissed co-defendant in the same lawsuit in which ETS is being sued, who ETS referred to collectively as HMM. *Id.* at 8-9.

Finally, in a footnote, and without any legal argument, ETS requested that the Commission issue a declaratory ruling stating that the Opt-out regulation (i) is inconsistent with

the plain language of the TCPA, *see* 47 U.S.C. § 227(b); (ii) exceeds the Commission’s authority, *see* 47 U.S.C. § 227(b); and (iii) raises significant First Amendment concerns. *Id.* at 9 ETS recognized that the Commission had previously rejected these arguments. *Id.*¹

ARGUMENT

I. BECAUSE ETS FAILED TO FILE THIS PETITION IN A TIMELY MANNER, AND FAILED TO PROVIDE ANY JUSTIFICATION FOR THAT FAILURE, THE PETITION SHOULD BE DENIED

As noted above, ETS filed this Petition on March 16, 2016, more than 1 year and 5 months after the FCC issued the Waiver Ruling, more than 8 months after ETS was added as a defendant in the class action case described above, about 7 months after ETS was served with the Second Amended Complaint naming it as a defendant, and more than 10½ months past the April 30, 2015 deadline for waiver applications set by the FCC, *Waiver Ruling*, ¶ 30. ETS has failed to provide any justification for its blatant disregard of the time frame set by the Commission for requesting a waiver. For this reason alone, ETS’s petition must be denied.

In the *Waiver Ruling*, the Commission explicitly stated: “We expect parties making similar waiver requests to make every effort to file within six months of the release of this Order,” i.e., October 30, 2014. *Waiver Ruling*, ¶ 30. ETS, which is a very large and sophisticated company, no doubt with highly skilled in-house and outside counsel, did not request a waiver by April 30, 2015. This is so, even though the underlying class action concerning a fax advertising its own service was pending against ETS’s sole distributor had been pending since July 2, 2013. ETS was no doubt aware of that lawsuit, and nevertheless did not seek a waiver by the April 30, 2015 deadline.

¹ For the reasons stated by the Commission in the *Waiver Order*, which are incorporated herein by reference, the Bureau should reject these arguments that were cursorily raised by ETS in a footnote.

Even assuming that ETS did not know about the lawsuit until ETS was served with the Second Amended Complaint naming ETS as a defendant on August 18, 2015, ETS still did not seek any waiver until about 7 months later on March 16, 2016. ETS's failure to request a waiver shortly after being served with the Second Amended Complaint on August 18, 2015 is especially egregious because it was no later than the end of August 2015 that ETS was, and still is, represented in that lawsuit by the law firm of Jones Day, which is one of the finest and most sophisticated law firms in the United States. In fact, the instant Petition was drafted by J. Todd Kennard, a partner at Jones Day experienced in TCPA litigation,² as well as an associate, Brandy Hutton Ranjan, who is also experienced in TCPA matters.³ Moreover, Mr. Kennard is one of eight Jones Day attorneys listed as an author of a November, 2014 article on the Jones Day website that specifically discusses the *Waiver Ruling*, and also is the author of other articles on the TCPA.⁴ Thus, there can be no doubt that ETS and its counsel knew about the Waiver Ruling, its significance, and its deadlines no later than the end of August 2015. Yet, ETS and its counsel still chose not to file a request for a waiver until almost 7 months later. It should therefore be no surprise that ETS and its counsel have provided no justification for why they took so long to do so. Under these circumstances, to entertain the Petition now would make a mockery of the six month deadline for Waiver Applications contained in the *Waiver Ruling*, and would render that deadline a dead letter. This, the Bureau should not — and, indeed, may not — do.

² See Firm Profile of J. Todd Kennard, located at <http://www.jonesday.com/jtkennard/>

³ See Firm Profile of Brandy Hutton Ranjan, located at <http://www.jonesday.com/branjan/>

⁴ See TCPA Reform Heats Up: Opt-Out Required for Solicited Faxes, and a Court Decision Pulls Back on Autodialers, located at <http://www.jonesday.com/tcpa-reform-heats-up-opt-out-required-for-solicited-faxes-and-a-court-decision-pulls-back-on-autodialers-11-03-2014/>; List of Publications of J. Todd Kennard, located at <http://www.jonesday.com/jtkennard/?section=Publications>.

ETS appears to contend that because the Bureau in a December 9, 2015 Order granted waivers to entities that submitted requests for such waivers after April 30, 2015, 30 F.C.C.R. 14057, ¶¶ 1 n.1, 22, ETS is entitled to a waiver here as well. However, those entities submitted their petitions from June through September, 2015. Here, ETS submitted its Petition almost six months *after* the last petitioner granted a waiver in the December 9, 2015 Bureau Order had submitted its petition.

ETS also appears to contend that it should be granted a waiver because HMH was granted a waiver. However, contrary to what ETS did, HMH made its request for a waiver on January 20, 2015, 30 F.C.C.R. 8598, ¶ 1 n.2, well within the April 30, 2015 deadline set by the Commission in the *Waiver Ruling*. Accordingly, the fact that the Bureau granted HMH a waiver on its timely petition for waiver is not a basis to ignore ETS's abject failure to file a timely petition here.⁵

II. THE COMMISSION LACKS AUTHORITY TO RETROACTIVELY WAIVE PRE-EXISTING STATUTORY CAUSES OF ACTION FOR VIOLATION OF THE OPT-OUT REGULATION

The Commission does not have the power to retroactively waive statutorily created causes of action under the TCPA. Therefore to the extent that ETS is requesting that the Commission waive the Opt-Out regulation in order to absolve ETS of liability under the class action brought against it by Bais Yaakov, the Bureau must deny that waiver.

The TCPA's private right of action based on violation of the Commission's regulations is authorized in the TCPA – a statute enacted by Congress. *See* 47 U.S.C. § 227(b)(3)(A) & (B).

⁵ In any event, a number of Applications for Full Commission Review of the waivers granted by the Bureau in its August 28, 2015 Order are still pending. *See, e.g.*, Application for Full Commission Review submitted by Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye, MD PC on September 25, 2015.

That section of the TCPA does not provide the Commission with any authority to waive or otherwise impair a private cause of action that arises under it.

Moreover, none of the TCPA's other provisions that do delegate authority to the Commission gives the Commission any right to impair that congressionally created private right of action. 47 U.S.C. § 227(b)(2)(B)-(G). Nor can the Commission claim any implied delegation of such authority. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (“Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental ‘that an agency may not bootstrap itself into an area in which it has no jurisdiction’”). Nor can the Bureau find any authority for impairing that private right of action in 47 C.F.R. § 1.3, which generally enables the Commission to waive the requirements of a *regulation*, but not a cause of action already accrued under a *statute* for violation of a regulation. *E.g., National Ass’n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009) (“the Commission has authority under its rules, *see* 47 C.F.R. § 1.3, to waive requirements *not mandated by statute* where strict compliance would not be in the public interest. . . .” [emphasis added]).⁶

Where, as is the case with the TCPA, a statute, creates a private right of action and does not give an agency any authority to impair it, the Courts have been vigilant about preventing an agency from overstepping its authority. *E.g., Natural Resources Defense Council v. E.P.A.*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (EPA lacked authority to create affirmative defense to private right of action established by Clean Air Act); *Adams Fruit, supra*, 494 U.S. 638, 649-50 (1990).

⁶ Nor would any effort to cast the requested waiver as simply an “interpretation” of the TCPA entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), be correct. *E.g., Brown v. Gardner*, 513 U.S. 115, 116-121 (1994) (because agency’s regulation required higher standard of proof than statute to collect benefits, regulation was not entitled to *Chevron* deference and was invalidated: “the text and reasonable inferences from the statute give a clear answer against the Government ‘agency’s regulation’”) (citations omitted).

A waiver of the Opt-out Regulation would violate this well settled precedent because the Commission lacks any authority to impair the private right of action asserted by Bais Yaakov against ETS.

As a result, the Commission has no authority to grant a retroactive waiver of the Opt-Out Regulation to ETS, and therefore, ETS's request for a retroactive waiver should be denied.

III. 1 U.S.C. § 109 ALSO PRECLUDES CONGRESS AND THE COMMISSION FROM RETROACTIVELY EXTINGUISHING LIABILITIES CREATED UNDER THE TCPA'S PRIVATE RIGHT OF ACTION IN THE ABSENCE OF EXPRESS CONGRESSIONAL AUTHORITY TO DO SO

1 U.S.C. § 109 provides in pertinent part that the repeal of any statute does not retroactively extinguish liabilities previously accrued under the statute unless the statute expressly, or by plain import, provides for such extinguishment. Accordingly, if Congress had desired to allow itself or the Commission to retroactively extinguish private causes of action created by the TCPA, Congress would have had to do so explicitly in the TCPA. *E.g.*, *Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 372-73 (D.C. Cir. 1998) (claim for compensation for injury incurred before repeal of workers' compensation law should be decided under repealed law because new workers' compensation law did not retroactively extinguish such liability under old statute, as required by 1 U.S.C. § 109).

Because Congress did not explicitly state that the private right of action under the TCPA for violation of the Commission's regulations could be retroactively repealed by Congress, much less that that private right of action could be abrogated by an administrative agency such as the Commission, any attempt by the Commission to extinguish private plaintiffs' right of action to pursue TCPA claims for past violations of the Opt-Out Regulation conflicts with 1 U.S.C. § 109 and the caselaw construing it. Accordingly, the Commission may not grant the retroactive waiver requested by ETS.

IV. A GRANT OF THE WAIVER REQUESTED BY ETS WOULD VIOLATE TWO SEPARATION OF POWERS PRINCIPLES

Any ruling purporting to retroactively waive preexisting private parties' liability for TCPA claims asserted in pending litigations violates separation of powers principles. Granting such a retroactive waiver does not interpret the TCPA, but effectively nullifies a statute creating a private right of action. Moreover, issuing retroactive waivers is not just defining the scope of when and how the Commission's rules apply, but instead is attempting to retroactively constrict the scope of a private right of action which the Commission lacks any authority to constrict. Accordingly, the retroactive waiver requested by ETS plainly implicates separation of powers concerns.

Any grant of a retroactive waiver to ETS would violate two separation of powers dividing lines: between the Commission and Congress, and between the Commission and the Judiciary. First, by issuing a Waiver Order that would purport to categorically extinguish preexisting liability incurred by ETS and other parties who filed waiver petitions, the Commission would improperly intrude into Congress's power to enact and repeal legislation creating private rights of action. *E.g., Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) ("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them.").

Second, because granting such a retroactive waiver to ETS would impair TCPA claims that Bais Yaakov has already have asserted in pending judicial proceedings, such a retroactive waiver would improperly intrude upon the province of the Judiciary. *Adams Fruit, supra*, 494 U.S. at 650 (rejecting Secretary of Labor's position limiting liability under statute "because Congress has expressly established the Judiciary and not the Department of Labor as the

adjudicatory of private rights of action arising under the statute”).⁷

Accordingly, the grant of the retroactive waiver requested by ETS would conflict with constitutional separation of powers principles and the caselaw construing them. Accordingly, the Commission does not have the power to grant such a waiver.

V. IT WOULD BE IMPROPER TO ISSUE A RETROACTIVE WAIVER TO ETS BECAUSE TO DO SO WOULD BE ISSUING A LEGISLATIVE RULE THAT LACKS CONGRESSIONAL AUTHORIZATION

As a matter of administrative law, the grant of a retroactive waiver to ETS would be the equivalent of a “legislative rule” that repeals an existing rule. That is because, the only support ETS cites to justify its request are two “legislative facts” – the NPRM and the Implementing Order – which ETS argues caused “confusion” warranting blanket waivers. Those facts are legislative because they apply equally to everyone, not to specific parties in a specific factual context. Consistent with the legislative nature of its request, the ETS did not cite or provide any individual evidence as to why it is entitled to a retroactive waiver. Indeed, ETS did not even see any need to provide any evidence that it was even aware of the NPRM or footnote 154 in the Implementing Order, much less relied on those items.

Further, the fact that the Bureau has sought comments from the public on ETS’s retroactive waiver request further confirms that this proceeding concerns a request for a retroactive legislative repeal of the Opt-Out Regulation.

Because ETS’s request for a retroactive waiver is requesting a legislative rule, the Commission may not grant such a waiver as it would retroactively to impair Bais Yaakov’s

⁷ See also *City of Arlington, Texas v. F.C.C.*, 133 S. Ct. 1863, 1871 n.3 (2013) (reaffirming that “*Adams Fruit* stands for the modest proposition that the judiciary, not any executive agency, determines ‘the scope’ — including the available remedies — ‘of judicial power vested by’ statutes establishing private rights of action.”).

“vested right,” to causes of action under the TCPA against ETS, which would be contrary to the U.S. Supreme Court’s decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“a statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms”); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

Accordingly, ETS’s request for a retroactive waiver of the Opt-Out regulation should be denied.

VI. EVEN IF THE GRANT OF A WAIVER WERE DEEMED AN ADJUDICATORY RULE, IT COULD NOT BE APPLIED RETROACTIVELY BECAUSE IT WOULD NOT SATISFY THE *RETAIL, WHOLESALE* TEST

Even if the retroactive waiver requested by ETS could alternatively be considered an adjudicatory rule, granting the waiver would also be improper because ETS would not have satisfied the requirements for retroactive applications of adjudicatory rules. As the D.C. Circuit held in *Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972):

“[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. . . .”
.....

Among the considerations that enter into the resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

See also Williams Natural Gas Co. v. F.E.R.C., 3 F.3d 1544, 1554 (D.C. Cir. 1993) (citations omitted) (where an adjudicatory rule “substitu[tes] new law for old law that was reasonable

clear. . . . it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.”).

ETS’s request for a retroactive waiver of the opt-Out regulation constitutes a “case of first impression” because the that request is asking that, after nine-plus years of having the Opt-Out Regulation on the books, the Opt-Out Regulation should be deemed effectively a nullity for those nine years. For the same reason, the granting of such a restorative waiver would represent “an abrupt departure from well established practice.” In addition, the parties “against whom the new rule is applied” — Bais Yaakov and other plaintiffs in TCPA litigations who have asserted claims against those seeking waivers – have plainly “relied on the former rule” by pursuing litigation claims based on that former rule. Further, because Bais Yaakov and others have spent years extensively litigating those TCPA claims in complex litigation, the “degree of burden” the grant of the requested retroactive waiver would impose upon them, by undermining important claims in those cases, is unquestionably severe. Finally, the “statutory interest in applying a new rule” – in this case the abrogation of an existing rule – is nonexistent. To the contrary, granting a retroactive waiver of the Opt-Out Regulation would discourage private parties from enforcing the TCPA and increase the burden on the Commission to police junk fax advertising.

Accordingly, even if the granting of a retroactive waiver of the Opt-Out Regulation were deemed to announce an adjudicatory rule, it would fail to satisfy each and every one of the five factors in the *Retail, Wholesale* test, and thus could not apply retroactively as ETS requests. As a result, ETS’s request for a retroactive waiver of the Opt-Out Regulation should be denied.

VII. ETS HAS FAILED TO DEMONSTRATE GOOD CAUSE FOR A WAIVER BY FAILING TO PLEAD WITH PARTICULARITY THE FACTS AND CIRCUMSTANCE WHICH WARRANT A WAIVER, AND BY FAILING TO ADDUCE CONCRETE SUPPORT OF SPECIAL CIRCUMSTANCES

WARANTING A WAIVER

The Commission's rules generally provide that "[a]ny provision of the [Commission's] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. To demonstrate good cause, a person requesting a waiver of a Commission rule "must plead with particularity the facts and circumstances which warrant" a waiver instead of making "generalized pleas." *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 & n.9 (D.C. Cir. 1969). The person requesting a waiver must "adduce concrete support, preferably documentary," of "special circumstances" warranting a waiver. *Id.*; *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008).

To grant a waiver, the Commission must first "articulate a relevant standard" it is following. *WAIT Radio, supra*, 418 F.2d at 1159. Second, the Commission must make a specific finding of "special circumstances." *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). And third, the Commission must find that the waiver "will serve the public interest." *Id.*

Nowhere in its request for a waiver has ETS articulated a "relevant standard" for determining when the Commission should or should not grant a waiver.⁸ Nor has ETS brought

⁸ While the Bureau has refused to grant a few waivers where it found that the entities requesting them had no knowledge of the TCPA, 30 F.C.C.R. 14057, ¶¶ 2, 20 (December 9, 2015), that refusal was completely inconsistent with the Bureau's previous grant of waivers to entities such as Amicus Mediation & Arbitration Group, Inc. in an August 28, 2015 Order, 30 F.C.C.R. 8598 (August 28, 2015), where the parties opposing the waiver had proven by record evidence that the entity requesting the waiver had no knowledge of the TCPA when it sent out its fax advertisements. *See December 12, 2014 Comments of Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye MD, PC*, at 3 & Exhibit A at 85-86; *December 15, 2014 Corrected Comments of Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye MD, PC*, at 3 & Exhibit A at 85-86. The Bureau's refusal to grant these waivers was also inconsistent with the full Commission's Waiver Ruling, which, when granting waivers, never distinguished between parties that had knowledge of the TCPA and those that did not. Thus, the denial of waivers by the Bureau did not set any "relevant standard" for waivers as required by the caselaw. Rather, it

forth any individualized evidence of “special circumstances.” Nor could ETS do so because ETS has not provided any specific facts upon which to make such findings. Instead, ETS has simply concluded that the existence of the NPRM and footnote 154 of the Implementing Order, by themselves, create a “presumption” of confusion about the existence and nature of the Opt-Out Regulation that constitutes special circumstances for the purpose of the waiver requests the Bureau granted. However, those two legislative “facts,” by themselves, are woefully insufficient to demonstrate special circumstances for numerous reasons.

First, ETS has not shown that it actually read, much less relied on, the NPRM or footnote 154 of the Implementing Order in coming to the conclusion that no regulation requires that opt-out notices appear on permission-based fax ads. Second, and more to the ultimate issue, ETS has

was an attempt, as part of the Commission’s litigation strategy in connection with the current appeal of the *Waiver Ruling* before the D.C. Circuit, to make it appear that the Commission was setting a relevant standard, even though the Commission knew that that supposed “relevant standard” was completely inconsistent with the full Commission’s and the Bureau’s previous rulings.

In any event, if the Bureau had set such a relevant standard, it would have been ETS’s burden in this Petition, as the party requesting a waiver, to come forward with concrete evidence that its personnel involved in the sending of the fax advertisements in this case met that standard, i.e., that those personnel had knowledge of the TCPA before the faxes at issue were sent. ETS has provided no such evidence, and therefore, even under the Bureau’s alleged “standard,” ETS has failed to come forward with evidence justifying the grant of a retroactive waiver.

Any argument that ETS’s relevant personnel should be “presumed” to have known of the TCPA before the fax advertisements at issue were sent would be improper as inconsistent with the requirement that it is entity seeking a waiver that has the heavy burden of demonstrating with concrete, particular and individualized evidence, good cause for a waiver. In addition, indulging in such a presumption would violate due process as Bais Yaakov has not been given an opportunity in this proceeding to depose ETS on this issue or to examine or cross-examine ETS on this issue at a hearing. *See McClelland v. Andrus*, 606 F.2d 1278, 1285-1286 (D.C. Cir. 1979)(holding that failure of agency to allow discovery of a report prior to an administrative hearing could violate of due process). If the Bureau intends to improperly make such a presumption, Bais Yaakov specifically requests an opportunity to depose ETS on this issue, or to have a hearing on this issue at which it can examine or cross-examine ETS, so that Bais Yaakov can attempt to rebut this presumption before the Bureau renders a decision on ETS’s Petition.

not shown that it actually was confused about the existence and nature of the Opt-Out Regulation. Third, ETS cannot credibly show that it actually was confused about the nature of the Opt-Out Regulation because the Regulation itself requires, in abundantly clear text, that fax ads sent to recipients who have agreed to receive them “must include an opt-out notice” 47 C.F.R. § 64.1200(a)(4)(iv); *Nack v. Walburg*, 715 F.3d 680, 683 (ruling that the Opt-Out Regulation, “read most naturally and according to its plain language, extends the opt-out notice requirement to solicited as well as unsolicited fax advertisements”), *cert. denied*, 134 S. Ct. 1539 (2014).

Fourth, any ruling that the NPRM and Implementing Order create a “presumption” of confusion, requiring that the parties opposing waivers come forward with evidence rebutting such a presumption, would improperly water down ETS’s proof requirements articulated in *WAIT Radio*, which mandate that a party *seeking* a waiver – not the party opposing a waiver – satisfy a “high hurdle even at the starting gate” and submit individualized “concrete support” to support the waiver. 418 F.2d at 1157 & n.9.

Finally, there is no evidence that granting ETS a waiver would be in the public interest. Nor, even though ETS contended that the public interest requires that they be shielded from ruinous liability, is there any underlying factual proof in the record to show such consequences if ETS is held liable for violating the TCPA, as *WAIT Radio* requires. Moreover, there is significant public interest in enforcing the Opt-Out Regulation – that the TCPA itself requires that it be enforced for the benefit of persons who receive millions of unwanted fax ads from ETS and others who are seeking waivers; that persons who receive purportedly permission-based fax ads should be instructed on how to follow the specific steps that the TCPA requires for opting out of receiving future unwanted fax ads; and that fax advertisers may erroneously or

fraudulently contend that they have received permission to send fax ads to persons who do not want to receive them.

At the end of the day, the Bureau must individually analyze ETS's request for a waiver and cannot grant it by simply concluding that ETS is "similarly situated" to the initial set of parties that obtained waivers from the Commission in its Waiver Ruling, based only on (1) the inconsistency between an Implementing Order footnote and the rule, and (2) the fact that the NPRM provided prior to the rule did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient. Such a "similarly situated" finding would be no substitute for the individualized factual evidence and findings required by *WAIT Radio* and its progeny for granting a waiver.

As a result, under 47 C.F.R. § 1.3 and the caselaw precedent of *WAIT Radio* and its progeny, ETS's Petition for a retroactive waiver of the Opt-Out Regulation should be denied.

CONCLUSION

For all the foregoing reasons, the Bureau should deny ETS's Petition for a retroactive waiver of the Opt-Out Regulation.

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Respectfully submitted,

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